



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: A2022-061733
COURT A *QUO*:

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE

SIGNATURE

04 March 2024



**THE SOUTH AFRICAN
MUNICIPAL WORKERS UNION
(SAMWU)**

Appellant

and

**IMBEU DEVELOPMENT
AND PROJECT
MANAGEMENT (PTY) LTD**

First Respondent

**ADVOCATE NASREEN RAJAB-
BUDLENDER SC**

Second Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 04 March 2024.

JUDGMENT

UNTERHALTER and MALINDI JJ (Mdalana-Mayisela J concurring)

Introduction

- [1] The Appellant is the South African Municipal Workers Union (SAMWU). A dispute arose between SAMWU and the First Respondent, Imbeu Development and Project Management (Pty) Ltd (Imbeu), concerning the liability of SAMWU under a service agreement concluded between the parties. They agreed to submit their dispute to arbitration under the AFSA rules. The Second Respondent (the arbitrator) was appointed as the arbitrator. Pleadings were exchanged, a pre-arbitration meeting was held, evidence and oral argument were heard before the arbitrator, and, on 21 May 2021, the arbitrator rendered her award. SAMWU was ordered to pay an amount that the arbitrator found to be due to Imbeu. The arbitrator dismissed SAMWU's counterclaim.
- [2] SAMWU brought an application to review and set aside the award in terms of s33 (1)(a) or (b) of the Arbitration Act 42 of 1965. SAMWU contended that the arbitrator had given the award on a basis neither pleaded nor agreed upon. The review came before Todd AJ. He held that even though the arbitrator had determined the matter on a basis that was not contended for or dealt with by the parties in their pleadings, the review must fail. Todd AJ found that the arbitrator made an award in respect of each of the claims brought by Imbeu, and the counterclaim pleaded by SAMWU that were referred to her. She did so on the basis of the evidence introduced in the course of the arbitration. That SAMWU may consider the arbitrator's reasoning to be faulty afforded no basis to review the award. SAMWU's application was accordingly dismissed with costs.
- [3] SAMWU sought leave to appeal. Leave was granted, but on a limited basis. Todd AJ's order reads as follows:

- “1. The Applicant is granted leave to appeal, subject to the condition in paragraph 2 below;
2. The issues on appeal are limited to the question whether the arbitrator exceeded her powers by making a determination on the issues referred to her on a basis that was not pleaded by either party.”

- [4] Before us, SAMWU placed some emphasis upon the finding of the court below that the arbitrator had ‘determined the matter on a basis that was not contended for or dealt with by the parties in their pleadings’. Once this is so, it was argued, the holding in *Hos+Med*¹ governs: an arbitrator has no jurisdiction to decide a matter not pleaded, where the parties have expressly submitted to arbitration only the matters pleaded.
- [5] SAMWU contended that we are bound by *Hos+Med*. That is uncontroversial, at least as that authority has been recently understood by the Supreme Court of Appeal in *Close-Up Mining*². SAMWU also argued that in terms of s17(5) of the Superior Courts Act 10 of 2013, the court below limited the issues on appeal, as we have indicated, and we must determine this appeal on that basis. Given the finding of the court below (‘the initial finding’) that the arbitrator ‘determined the matter on a basis that was not contended for or dealt with by the parties in their pleadings’, the question referred to this court permits of only one answer: the arbitrator enjoyed no jurisdiction to decide the matters referred to her on a basis not pleaded.
- [6] The first issue for us to decide is whether we are bound by the initial finding. SAMWU submitted that we are so bound. That is not so. The question before us is whether the arbitrator determined issues referred to her on a basis not pleaded. To decide this issue, we must decide whether the factual premise from which the court below proceeded, that is the initial finding, is correct. What was referred to the arbitrator for determination and what was pleaded by the parties are facts relevant to answering the question raised by this appeal. An appellate court is not bound to accept the facts found by the court below. If these findings are plainly wrong, an appellate court can, and often must, correct them.

¹ *Hos+Med Medical Scheme v Thebe ya Pelo Healthcare* 2008 (2) SA 608 (SCA)

² *Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another* 2023 (4) SA 38 (SCA)

- [7] The pleadings before the arbitrator raised the following issues. Imbeu made two claims. In Claim A, it alleged that an amount of R738 840.00 was owing by SAMWU in respect of work performed, being stage 1 of the project, pursuant to the service level agreement concluded between the parties. In Claim B, Imbeu claimed damages arising from the alleged repudiation of the agreement. SAMWU pleaded that the agreement was not authorised and had been fraudulently concluded. SAMWU brought a counterclaim for an amount of R561 570. It alleged that it had paid this amount to Imbeu, but no services were rendered. The payment was alleged to constitute unjust enrichment.
- [8] The pleaded issues before the arbitrator were thus the following: was the service level agreement binding; if it was, was Imbeu entitled to an award in the amounts it claimed in Claims A and B; and, was SAMWU entitled to an award in its favour for the amount it claimed as unjust enrichment? The arbitrator identified these pleaded issues in paragraph 9 of her award.
- [9] The arbitrator considered the evidence before her and concluded that the agreement was validly concluded. The arbitrator referred to the evidence that SAMWU had agreed to pay the outstanding sum claimed by Imbeu, in respect of stage 1 of the project, even after it became aware that certain office bearers had concluded irregular contracts. This agreement ('the subsequent agreement') was reflected in minutes of meetings held between the parties and subsequent e mails. The minutes were not disputed in evidence. Based upon this evidence, the arbitrator found for Imbeu in respect of Claim A to the extent of the subsequent agreement. The arbitrator dismissed Claim B as having no basis. The arbitrator dismissed SAMWU's counterclaim in that, since SAMWU had accepted the obligation to pay for the work done by Imbeu in respect of stage 1 of the project, SAMWU could not claim that it had paid for services it had not received.
- [10] Ms Kekana gave evidence in the arbitration proceedings. Ms. Kekana's evidence was to this effect. In May 2019 she, with others, were tasked with negotiating with debtors because the appellant was experiencing financial difficulties. During this process, it was discovered that Imbeu's attorneys had written a letter of demand to SAMWU for outstanding monies. She was present at meetings held on 18 and 19 July 2021 with Mr.

Mahlangu, Imbeu's Sole Director and Project Manager, and his legal representatives. A payment plan was negotiated and agreed to pay these outstanding amounts.³ It was recorded that:

*"The agreement is that there is a need to sort out the account and acknowledge the current debt."*⁴ In addition to the payment plan agreed and acted upon in July 2019, SAMWU acknowledged on 6 December 2019 that it owes Imbeu R431 000.00 and it undertook to pay it over 7 months.⁵

- [11] SAMWU submits that the arbitrator, relying upon this evidence to uphold portion of Claim A and dismiss the counterclaim, strayed beyond the pleadings, and thus rendered an award outside her jurisdiction. In particular, SAMWU complains that Imbeu's pleadings did not rely upon the subsequent agreement, nor plead an acknowledgement of indebtedness.
- [12] This submission fails to distinguish the issues referred to the arbitrator arising from the pleadings and the evidence the arbitrator was at liberty to consider in deciding these issues. Imbeu's Claim A did not require it to plead the subsequent agreement or the acknowledgement of indebtedness by SAMWU. Claim A is a claim to be paid for services rendered. The evidence that the services were rendered is that SAMWU was willing to pay for them, and hence it admitted they *were* rendered, after the issue of the malfeasance of its office bearers was raised. It was evidence that amounted to an admission to which the arbitrator was entitled to have regard. That there was other evidence that the arbitrator may have considered founds no basis for review. Once there was evidence that the services were rendered by Imbeu in respect of stage 1 of the project, there was plainly no basis to find that Imbeu was unjustly enriched. SAMWU had paid for services rendered.
- [13] It follows that the court below was incorrect in its finding that the arbitrator determined matters not pleaded. The arbitrator identified the issues referred to her for determination that arose from the pleadings, and then rendered an award to decide those issues. That

³ Award as at CaseLines section 03-46, paragraphs 26.3-28; Minutes of Meetings of July 2019 as at CaseLines section 03-1372.

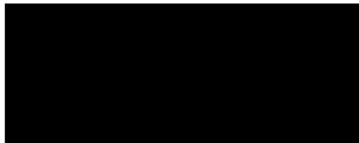
⁴ Minutes of Meeting at paragraph 2.

⁵ Award as at CaseLines section 03-469, paragraph 30.

she did so on the basis of the uncontested evidence before her is a commonplace exercise of arbitral competence.

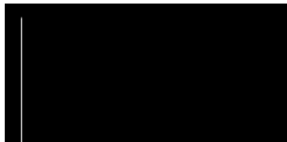
[14] The appeal must therefore fail.

[15] We make the following order: the appeal is dismissed with costs.



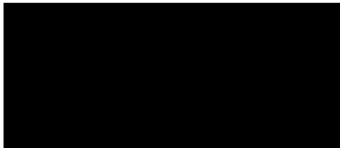
UNTERHALTER J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I agree:



MDALANA-MAYISELA J (Ms)
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I agree:



MALINDI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

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D.J. Sibuyi
DMS Attorneys

DATE OF HEARING:
DATE OF JUDGMENT:

14 February 2024
04 March 2024